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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP001980-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID JEROME GANT,

Defendant-Appellant.

On Notice of Appeal to Review a Judgment of Conviction Entered in the Circuit Court for Milwaukee County, the Honorable Ellen R. Brostrom, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Police Had No Lawful Basis to Seize Mr. Gant's Computer Following His Wife's Suicide.

The State acknowledges that the police needed probable cause to seize Mr. Gant's computer. (State's Response at 5). The State further acknowledges that probable cause required the State to show a "fair probability" that evidence of a crime would be found in that particular place, and also that police could only seize an item under the plain view doctrine if the police had "probable cause to believe there is a connection between the evidence and criminal activity." (State's Response at 5).

The State nevertheless attempts to argue that the police did have probable cause to seize Mr. Gant's computer following his wife's suicide based on pure speculation of what *might possibly* be on a computer *in every case* where a person is found dead inside a home.

The State attempts to suggest that police had probable cause based on the fact that Mr. Gant's computer was located in the same room where Mrs. Gant hanged herself and where Mr. Gant set her down after discovering her dead. (State's Response at 6-7). The State suggests that this somehow established probable cause because the "officers were not required to accept Gant's word" that his wife hanged herself, and even if she had, "Gant could still be responsible for the crime of assisted suicide." (State's Response at 7). But this argument falls flat because the State still cannot point to any specific facts linking Mr. Gant's computer to evidence of a crime, or even suggesting that a crime occurred; instead, the

evidence established that police had no specific reasons for seizing those computers.

Detective Goldberg, who seized the computers, explicitly testified that police did not have any "special interest" in them—he explained that police just had a "general interest" in case there was a "suicide note or other evidence on the computer." (40:31;Gant Initial App.114). Further, the State's argument concerning the proximity of the computer to the body fails as it ignores the fact that police seized—among other things—*three* computers in the home, one of which was found upstairs. (40:31;Gant Initial App.114).

The State also attempts to suggest that—even though the detective who seized the computers acknowledged that the Gants' young daughter's statement about her mother using the computer had nothing to do with the seizure of the computers, (40:36;Gant Initial App.119)—police had knowledge of this information under the collective knowledge doctrine. (State's Response at 7). But police explained that the Gants' young daughter simply told them that her mother had at some unspecified point played a "Dora computer game" on one of the computers, and had not specified which computer. (40:35-36;Gant Initial App.118-19). This statement in no way suggests a fair probability that evidence of a crime would be found on Mr. Gant's computer.

To adopt the State's argument would be to substitute pure speculation for probable cause. Under the State's rationale, every time a person dies in a home, police would have probable cause to seize any computers they see inside the home, because police would have reason to believe that a death *could* be a "potential homicide investigation" and computers "may provide relevant information that supports a homicide prosecution," as the State here argues. (State's

Response at 7). Even when all available facts point to suicide, under the State's theory, police could seize computers based solely on speculation that there *might* possibly be evidence of a "crime of assisted suicide" on them, as the State here argues. (State's Response at 7).[1]

And why stop at computers? The State's rationale would just as easily apply to any notebooks, briefcases, CDs, cell phones—practically anything inside someone's home could *possibly* contain evidence of a crime when a person is found dead inside the home. But the Fourth Amendment's

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[1] The State cites ***State v. Jensen***, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, for the broad assertion that "[p]rior case law demonstrates that a seized computer's Internet browsing history may provide relevant information that supports a homicide prosecution and undermines a defendant's claim that the victim committed suicide." (State's Response at 7). In that case, following the death of his wife, the defendant signed a consent to search form allowing police to conduct "a complete search of my premise, automobile, and or person;" the form further noted "I do hereby authorize the said police officers to take from my premise, automobile and/or person any letters, writings, paper, materials or other property which they may desire." ***Id.***, ¶ 17. After police seized and searched his computer pursuant to this consent form, the defendant argued that "[n]o reasonable person would have anticipated that evidence relating to a death would have extended to seizing and searching Mr. Jensen's home computer." ***Id.***, ¶ 92. The Court of Appeals disagreed, concluding that a reasonable person who signs such a consent form would not believe that "other property was limited to papers and written materials." ***Id.***, ¶ 93.

The ***Jensen*** case did not even suggest that police inherently have probable cause to seize a computer from a home simply because a person has died there. The seizure of the computer in that case was based on the defendant's signed consent form. And, importantly, unlike the defendant in ***Jensen***, Mr. Gant signed a form allowing consent for police to search the house, car, and his cell phone, but *not* the computers. (40:43;Gant Initial Brief App.126).

probable cause requirement demands more than a possibility which could just as equally apply in any case—probable cause demands *specific* facts establishing a fair probability that *in this case* evidence of a crime will be found on the items seized.

II. Police Had No Lawful Basis to Keep Mr. Gant's Computer for Over Ten Months Prior to Obtaining a Warrant to Search It.

The State "disagrees" with Mr. Gant's argument that police cannot keep items seized without a warrant indefinitely without any attempt to search the item. (State's Response at 8). The State notes that on a "regular basis, both with and without search warrants," police inventory seized property and secure it for safekeeping. (State's Response at 8). As support for this assertion, the State points to five cases. Four of those five cases, however, deal with police inventory seizures and search of cars and items within cars. *See* ***South Dakota v. Opperman***, 428 U.S. 364 (1976), ***State v. Weide***, 155 Wis. 2d 537, 455 N.W.2d 899 (1990), ***State v. Callaway***, 106 Wis. 2d 503, 317 N.W.2d 428 (1982), and ***State v. Weber***, 163 Wis. 2d 116, 417 N.W.2d 187 (1991). First, courts have "traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment." ***South Dakota v. Opperman***, 428 U.S. at 367; *see also* ***State v. Callaway***, 106 Wis. 2d at 508. But even further, these cases do not address how long police may keep items seized.

State v. Betterley, the fifth case the State cites in support of its argument here, concerns a second search of items inventoried after the defendant was taken into custody on a probation hold. 191 Wis. 2d 406, 529 N.W.2d 216 (1995). Upon taking him into custody, police found a ring in

the defendant's pocket and placed it in a jail property box. ***Id.*** at 414-15. The defendant did not challenge this initial search and seizure. ***Id***. at 415. Later that day, police investigating the defendant for insurance fraud (for claiming that items, including a ring, had been stolen), learned that the defendant was in custody and that police had discovered a ring during the inventory search. ***Id.*** Police removed the ring from the property box and showed it to the jeweler who sold it to the defendant, who identified it as the ring he had sold the defendant. ***Id.*** In assessing the constitutional reasonableness of the second look at the ring without a search warrant, the Wisconsin Supreme Court considered the "timing of the second look." ***Id***. at 419-20. The Court concluded that a "'reasonable time' is as long as the possessions of the defendant would normally be held by the police." ***Id.*** at 420. The Court concluded that the timing of the second look was reasonable because it "occurred within hours after [the defendant] was taken into custody." ***Id.***

Betterley thus involved the analysis of the timing of a warrantless *search* following a person being taken into custody, not how long police may reasonably keep an item seized without a warrant and without any attempt to obtain a search warrant related to the purported initial reason for the seizure. But insofar as the Court's rationale concerning the timing of the second search may be informative of the reasonableness of the seizure in this case, the Court there concluded that the timing of that warrantless search was reasonable because it occurred within *hours* after the defendant was in custody. Here, however, police kept Mr. Gant's computer for over *ten months* before applying for a warrant to search it, and during that time made no attempts to search it for anything related to Mrs. Gant's death, which was their purported justification for seizing it in the first place.

The State further argues that the police keeping Mr. Gant's unlawfully seized computer for over ten months without making any effort to try and search it for anything related to Mrs. Gant's death was not unreasonable because he "undertook no efforts to follow through on its return by bringing a motion for its return." (State's Response at 11). Though the State recognizes that Mr. Gant "on two occasions" "went to the police department to obtain the return of his computers," and though the "State is unaware of any evidence in the record that suggests that police were still diligently pursuing the death investigation" at the time of his first request, the State nevertheless maintains that the seizure was not unreasonable because Mr. Gant did not use the proper "procedural mechanism" of a return of property motion. (State's Response at 9-11).

The State fails to point to any authority to support its argument that Mr. Gant's failure to file a return of property motion somehow nullified the illegality of the over ten-month seizure, particularly where Mr. Gant did make multiple attempts to retrieve his computer from the police department and where, as Mr. Gant testified, his brother-in-law *was* able to retrieve property that belonged to him. (40:78-80,84-85;Gant Initial App.161-63,167-68).

And though the State recognizes that there was no evidence presented that the State was investigating Mrs. Gant's death when Mr. Gant first asked for his computer back in October of 2010, the State—citing the circuit court—notes that "a month after Crystal Gant's death and well before his [Mr. Gant's] second request for his property's return, Gant was charged with exposing his genitals to a child." (State's Response at 11). But there was no evidence presented to suggest that this offense had any connection at all to a computer or child pornography. As set forth at the

suppression hearing, the first mention police received suggesting that Mr. Gant may have been in possession of child pornography did not occur until April 5, 2011, about sixth months after the property was seized and well after Mr. Gant's second attempt to retrieve his computer in February 2011. (40:48-49,54,58,79-80;Gant App.131,137,141,162-63).

Police had no lawful basis to seize Mr. Gant's computer in the first place and then made no attempt to get a warrant to search it based on their purported justification for seizing it initially; Mr. Gant made two attempts to retrieve his computer, thereby asserting his possesssory interest; police nevertheless held it for over ten months before obtaining a warrant to search it for child pornography—which police had no idea would even possibly be on the computer until six months after the seizure. The actions of the police showed blatant disregard for Mr. Gant's Fourth Amendment rights.

III. The Search Warrant Obtained Over Ten Months After the Computer Was Seized Did Not Render the Evidence Retrieved from the Illegally-Seized and Detained Computer Admissible, Given the Flagrant Disregard Shown by Police.

"The exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." ***State v. Dearborn***, 2010 WI 84, ¶ 38, 327 Wis. 2d 252, 786 N.W.2d 97. This is just that type of case. The police acted with flagrant disregard for Mr. Gant's Fourth Amendment rights both in initially seizing his computer without any specific facts supporting probable cause, and then further by keeping his computer for over ten months before obtaining a warrant, over his repeated requests

to get it back and without any facts suggesting any link to the computer and any criminal offense until roughly six months after the seizure. The State's flippant attempts to justify this illegal action further reflect the need for suppression in this case.[2]

The State asserts that, in its position, "the independent source doctrine and attenuation doctrine are two distinct exceptions to the exclusionary rule," and "[w]hether the conduct is flagrant has no bearing on the independent source analysis, but may be an appropriate consideration under the attenuation doctrine." (State's Response at 12-13, 16). Mr. Gant analyzes this question as whether the warrant—as an intervening circumstance—sufficiently attenuated the taint of the police's unlawful action of seizing and keeping the computer. Insofar as the independent source doctrine may function independently from the question of attenuation, however, suppression is still warranted here because the evidence derived from the search warrant does not properly fall under the independent source doctrine.

Evidence satisfies the independent source doctrine if the evidence admitted is "discovered by means *wholly independent* of any constitutional violation." ***Nix v. Williams***, 467 U.S. 431, 443 (1984)(emphasis added). Mr. Gant does

[2] This is particularly true with regard to the State's argument that the unjustified continued seizure of the computer was rendered reasonable by Mr. Gant's failure to file a motion for return of property. To suggest that the over ten-month seizure of the computer from Mr. Gant's home—without any attempt by police to search it for evidence related to his wife's death, and further where Mr. Gant refused consent to search the computer and then made multiple attempts to retrieve it—shows a troubling disregard for Mr. Gant's Fourth Amendment protections.

not dispute that the information cited as probable cause for the warrant to search the computer was derived from sources outside of the computer itself. But the bottom line is that the evidence obtained from that computer was not *wholly* independent of police misconduct, because the police had that computer immediately accessible and ready to be searched because of their illegal seizure and compounded by their illegal retention of it for months. Indeed, the police felt it important to include in the warrant affidavit that the computer was placed inventory following the death of Mrs. Gant, including the "computer tower," and was "in the possession of the City of Milwaukee Police Dept." (43:3,6).

The State further argues that this Court should not order suppression because to do so imposes "substantial societal costs by setting Gant free." (State's Response at 14). But exclusion of evidence always comes at a cost; that is the very point of the exclusionary rule—to be a deterrent to prevent police from engaging in the same illegal conduct in the future. And while Mr. Gant in no way disputes that possession of child pornography is a serious crime, the question is not how serious the offense is, but is how effectively suppression would serve as a deterrent.[3] The disregard the police showed by unlawfully taking and seizing his computer for over ten months before obtaining a warrant

[3] Additionally, though Mr. Gant maintains that the severity of the underlying crime should not bear relevance to this Court's analysis of whether to suppress the evidence, insofar as this Court is inclined to consider the State's argument concerning the societal costs "by setting Gant free," it is important to note that there is no guarantee from this record that suppression of the illegally-obtained evidence illegally would actually "set[] Mr. Gant free." Though he only pled to the child pornography charges, multiple other counts not involving child pornography were dismissed and read in as part of the plea agreement in this case. (*See* 41;Gant Initial Brief at 3,n.2).

to search it reflects the serious need for exclusion to deter police from engaging in this same unconstitutional conduct in the future.

Lastly, the State asserts that if this Court concludes that a Fourth Amendment violation occurred and further that "the record is not adequate" concerning the applicability of independent source and attenuation, this court "should remand the case for a hearing on the applicability of these exceptions." (State's Response at 23). The State fails to identify, however, any further facts that would need to be elicited for this Court to engage in this analysis. As the State discusses when analyzing whether this Court should order suppression, the evidence at the suppression hearing addressed not only the initial seizure and continued detention of the computer, but also the search warrant (and grounds for that warrant) that police ultimately obtained. (*See, e.g.*, State's Response at 16-23).[4] The duration of time, circumstances leading up to police obtaining the warrant, and the grounds for the warrant itself were all discussed at the suppression hearing. As such, further fact-finding is unnecessary.

[4] The search warrant and supporting affidavit were admitted into evidence at the suppression hearing. (40:75-76;43;Gant Initial Brief App.158-59).

CONCLUSION

For these reasons, Mr. Gant respectfully requests that this Court reverse the decision of the circuit court denying his motion to suppress evidence seized from his home following the death of his wife.

Dated this 3rd day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,979 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of March, 2015.

Signed:

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